

were essential to the internal disclosure. Those allegations were the lynchpin of part 5 of the internal disclosure report.

1294 Ms McMullan plainly accepted that she was 'required to investigate the disclosure' pursuant to the PID Act. She notified me accordingly. Under the PID Act, Ms McMullan was not at liberty to 'make the finding' that 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', which would, in turn, permit Ms McMullan to refuse to make 'further findings about any such comments that may have been made'. Ms McMullan was duty bound to investigate the conduct. She may have found that Justice Greenwood was not misled or, even if he was, responsibility would not be ascribed to Mr Soden. But in refusing to make 'further findings about any such comments that may have been made' on the misconceived basis that 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', it is my view that Ms McMullan derogated from her duty to investigate the internal disclosure and lapsed into an error of law (i.e. she misapprehended her duties under the PID Act).

1295 For the reasons set out, I am convinced Ms McMullan's investigation of the internal disclosure was inadequate.

## 9. CONCLUDING NOTES

### 9.1 Non-compliant PID report

1296 On Wednesday, 23 December 2020, Ms McMullan provided me with a redacted copy of her investigation report. A copy of that report is set out in Annexure EDR – 11.

1297 Section 51 of the PID Act sets out, among other things, duties and obligations associate with the preparation of a PID report.

1298 Subsection 51(3) of the PID Act provides that '[i]n preparing the report [of the investigation], the principal officer must comply with any standards in force under section 74'. The reference to principal officer extends to the principal officer's delegate.

1299 The standards in force under section 74 of the PID Act are the *Public Interest Disclosure Standards 2013*. Section 13 of those standards provides:

A report under section 51 of the Act must, where relevant:

- (e) identify whether there have been one or more instances of disclosable conduct; and
- (f) identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct relates; and
- (g) explain the steps taken to gather evidence; and
- (h) set out a summary of the evidence, as well as any findings and recommendations made based on that evidence.

1300 Paragraph (d) has two elements. A report under section 51 of the PID Act must have:

- first, a summary of the evidence; and
- second, findings and recommendation made based on the evidence identified.

1301 Paragraph (c) has only one element. A report under section 51 of the PID Act must contain an explanation about the steps taken to gather evidence.

1302 I will focus my criticisms on Ms McMullan's failures to comply with the first element of paragraph 13(d), as well as paragraph 13(c) of the *Public Interest Disclosure Standard 2013*.

1303 There is no summary of the evidence on which Ms McMullan relied on in her PID report. The closest thing to a summary of evidence in her PID report is set out in the opening paragraphs of her PID report. Those opening paragraphs read as follows:

I, Kate McMullan, A/g Assistant Commissioner Integrity Performance and Employment Policy, and delegate of the principal officer of the Australian Public Service Commission, have prepared this investigation report in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard).

The investigation report relates to the following disclosure:

<b>Discloser's pseudonym</b>	[REDACTED]
<b>Discloser's email address</b>	[REDACTED]
<b>Agency the disclosure relates to</b>	Federal Court of Australia Statutory Agency
<b>Date of allocation to the Commission</b>	11 May 2020
<b>Date of this decision</b>	9 December 2020

#### **Matters considered**

In preparing this disclosure report I have considered the following relevant matters:

- Disclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020) outlining disclosures amounting to allegations that proper recruitment practices were not undertaken with respect to the recruitment processes leading to the appointment of:
  - Mr Murray Belcher
  - Mr Russell Trott
  - Ms Susan O'Connor
  - Ms Claire Gitsham
  - Mr Matthew Benter
  - Mr Rupert Burns
  - Mr Phillip Allaway
  - Mr Tuan Van Le
  - Ms Caitlin Wu
  - Mr Rohan Muscat
- Materials provided by the Federal Court of Australia Statutory Agency on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me.

1304 Ms McMullan's adverts to:

- '[m]aterials provided by the Federal Court of Australia Statutory Agency on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me'; and
- to a '[d]isclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020)'.

1305 Ms McMullan's statement that materials were provided by the 'Federal Court of Australia Statutory Agency on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me' is not a summary of evidence. It is a

statement as to the dates on which unidentified materials were provided to her. Nothing about the substance of the materials is set out. No descriptions of the materials are provided. Absent some other means, there would be no way of determining what the correspondence related to and whether, in considering the 'materials', Ms McMullan chose to rely on the materials as evidence.

1306 By way of analogous example, if Ms McMullan had conducted her investigation before the use of email had become ubiquitous (i.e. in the era of the posted letter), Ms McMullan would effectively have said that the 'Federal Court of Australia Statutory Agency' provided me with envelopes on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 in which there was information 'about the process underpinning the engagement of the each of the persons above, in response to requests for information from me'.

1307 Stating when she received the digital equivalent of envelopes of information 'about the process underpinning the engagement of the each of the persons above' does not constitute '[setting] out a summary of the evidence, as well as any findings and recommendations made based on that evidence'.

1308 Ms McMullan's statement that she considered a 'disclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020)' is not a summary of evidence. It is merely a statement about her consideration of a 'disclosure report and attachments' and correspondence. Nothing about the substance of the correspondence is set out. Absent some other means, there would be no way of determining what the correspondence related to and whether, in considering the 'correspondence', Ms McMullan chose to rely on the materials as evidence.

1309 Moreover, there is very little by way of explanation in Ms McMullan's report on the steps taken to gather evidence. That is unsurprising given that Ms McMullan did not adequately investigate the allegations set out in the internal disclosure report. The extent of Ms McMullan's explanations on the how evidence was gathered can be distilled into a single phrase – 'materials provided by the Federal Court of Australia Statutory Agency'.

1310 It is evident, on the face of the PID report Ms McMullan prepared, that Ms McMullan failed to comply with paragraphs 13(c) and (d) of the *Public Interest Disclosure Standard 2013* and, by

extension, failed to comply with her duty under subsection 51(3) of the PID Act. Accordingly, the PID report is substandard.

## **9.2 Concluding remarks about Ms McMullan's investigation**

- 1311 As I have typed this external disclosure report, I have reflected on the manner in which Ms McMullan investigated the internal disclosure that I made to an authorised internal recipient in the Office of the Commonwealth Ombudsman on 23 March 2020. The opportunity to reflect has left me quite irritated with Ms McMullan.
- 1312 I waited nine months from the moment I submitted the internal disclosure report to an authorised internal recipient in the Office of the Commonwealth Ombudsman on 23 March 2020 to receive Ms McMullan's PID report. For the reasons set out, it is a ten page disappointment. But there is more to my disappointment.
- 1313 I feel betrayed by Ms McMullan. I submitted the internal disclosure report, in March 2020, certain that the staff members at the APSC, the Public Service's primary integrity agency, would, without fear or favour, ensure that the allegations of wrongdoing by members of the Federal Court of Australia Statutory Agency would be investigated, and that those staff members would ensure that those found to have contravened the laws of Australia would be held to account. By December 2020, I was exposed as a fool. My faith in the rectitude and decency of that the staff members of the APSC was a complacent faith. The certainty I had in the commitment to excellence that people in the Australia Public Service shared was outed as mere illusion. I can no longer look my colleagues in the eye and say that I have faith in APSC and its management. It's demoralising.
- 1314 To stare at a fool in the mirror – that is not pleasant. But then I was at fault for falling for the myth of the meritocratic public service. I was at fault for believing that, on the whole, a commitment to integrity in the Australian Public Service was real. I should not be so bitter. Nor should I be surprised. After all, Sir Paul Hasluck lamented long ago about the 'beer-bellied babblers, the screaming scavengers and the noisy grabbers' that were increasingly becoming a 'nuisance, roosting under the eaves of government'. Why should that trend be any different now? It was foolish of me to believe that the primary integrity agency for the Australian Public Service would not also contain its share of 'beer-bellied babblers', 'screaming scavengers' and 'noisy grabbers'. The Federal Court of Australia Statutory Agency has them; why wouldn't the APSC?